Beyond Our Legal Borders*

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The Supreme Court's recent decision in Hamdan v. Rumsfeld offers fresh context for an old controversy, and not just that of the long-contested war powers of the president. Broadly considered, Hamdan invites judges, lawyers, and scholars to consider the circumstances under which international law applies in domestic courts.

In fact, Hamdan is just the tip of that iceberg, given the notable trend within U.S. courts to find a rule of decision in treaties and, occasionally, in the unwritten customary international law. These domestic cases, in which international law could apply, touch on a huge range of practice areas, from commercial, environmental, and family law to criminal law, civil procedure, and corporate law. As a result, over the past several decades international law has evolved from a separate and specialized field of law into an aspect of virtually every field of law.

Take civil procedure, for example. Traditionally, civil litigation in the United States has been considered an exercise in domestic law, with courts and litigators alike turning to statutes and the common law for a rule of decision and assuming that the procedures, parties, and issues remain domestic. First-year law students have studied civil procedure as a required course, being introduced to the ways of litigation in U.S. courts on the assumption that litigation stops at the water's edge.

By contrast, international law has been considered a boutique specialization, to be studied, if at all, only as an upper-level elective. The problem with this conventional approach is that it assumes what experience denies. Practitioners,

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students, judges, and teachers must now confront a much more complicated reality, in which the rules of civil procedure and treaty- or custom-based rules routinely intersect, overlap, and sometimes clash.

TIME TO RECONSIDER

From this perspective, Hamdan may offer an occasion to reconsider the basic structure of the law school curriculum, especially in the first year, and to revisit Christopher Columbus Langdell's long-lived fixation with appellate decisions in domestic common law subjects such as torts, contracts, and property. Today it's more important than ever to ask, What, if anything, should law schools be requiring students to learn about international law?

One plausible answer is to teach nothing. Certainly those opposed to the results in some high-profile decisions — regarding the juvenile death penalty or private, consensual homosexual conduct — have strenuously objected to the majorities' decision to refer to foreign and international law in support of a conclusion determined by wholly domestic sources of law.

Justice Antonin Scalia opined that the Court "should cease putting forth foreigners' views as part of the reasoned basis of its decisions. To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decision-making, but sophistry." And last year two bills were introduced in Congress which prohibited the federal courts from resolving constitutional questions by referring to "any constitution, law, administrative rule, Executive order, directive, policy, judicial decision, or any other action of any foreign state or international organization or agency, other than English constitutional and common law up to the time of the adoption of the [U.S.] Constitution."

One rationale for the resistance is that foreign law and international law — especially customary international law — suffer from “the democratic deficit.” Neither has survived the political ordeal laid out in the Constitution for the establishment of law. Customary international law arises instead out of a “general practice [of states] accepted as law,” in the words of the Statute of the International Court of Justice. It’s easy to believe that states don’t behave in any consistent pattern, let alone act out of a sense of legal obligation. Doubtless, proving the existence and content of customary law is never simple.

HISTORY ON ITS SIDE

But those who resist the application of international law in domestic courts — or who strongly doubt the relevance of international law in the law school curriculum — have to overcome a lot of history.

Under the supremacy clause of the Constitution, for example, the treaties of the United States are “the Supreme Law of the Land,” on a par with federal legislation, “and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.” The Supreme Court has established that treaties may even be interpreted and applied against the executive branch, as in Hamdan itself, although the president’s views are entitled to substantial deference. By contrast, customary international law, or “the law of nations,” is not explicitly included in the supremacy clause and in this respect resembles other forms of federal law such as executive orders and administrative regulations.

But the Supreme Court has held repeatedly that customary international law is to be treated as federal common law. In 1900 in The Paquete Habana, the Supreme Court said:

“International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon it are duly presented for their determination. For this purpose, where there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations, and, as evidence of these, to the works of jurists and commentators who by years of labor, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.”

In other words, international law, where it exists in conventional or customary form, is federal law, presumptively binding according to its terms.

In addition, in Murray v. The Schooner Charming Betsy (1804), Justice John Marshall offered an interpretive guideline for accommodating international law and domestic legislation: The statutes enacted by Congress, he said, “ought never to be construed to violate the law of nations if any other possible construction remains.” The Charming Betsy principle has been reaffirmed without much reflection or analysis by the federal courts since it was announced, and, like other canons of construction, it is sometimes dismissed as innocuous or meaningless.

DEFAULT DRIVE

But domestic courts continue to invoke the principle as a kind of default drive: If Congress means to legislate in violation of international law and says so explicitly, the violation may persist at the international plane, but the statute will

still prevail in U.S. courts. The logic of Charming Betsy requires the courts to try to find an interpretation that is faithful to international law before assuming that Congress has actually exercised its authority to legislate in violation of it.

But the Court has also recognized that the political branches have the constitutional authority to override international law in narrow circumstances, adopting an array of doctrines to resolve conflicts between international and domestic law. A treaty in violation of explicit, prohibitory provisions of the Constitution, for example, is invalid. And when a statute and a treaty conflict, the one that came later prevails to the extent of the conflict. Customary norms can also be displaced by a "controlling executive or legislative act," and the domestic courts will then be obliged to follow not international law but the controlling domestic law. In addition, the courts have developed the self-executing treaty doctrine, which can prevent an international treaty from creating rights that are enforceable in a domestic court, but the courts' tests for distinguishing between self-executing and non-self-executing treaties rarely produce predictable results.

These doctrines are the genetic marker of American dualism, but they should not be interpreted as though they establish the general irrelevance of international law. They are, after all, essentially pathological: They operate only when there is an unavoidable and intentional conflict between international and domestic law and it is necessary to choose one over the other. They are irrelevant in the more common circumstance in which the executive and legislative branches do not intend to violate or override international law but wish to be perceived as acting in conformity with it. It is rare, in other words, that Congress or the executive branch actually exercises its powers to override international law. To the contrary, compliance is institutionally preferred, given the consequences of a perceived violation of international law.

So how should law schools responsibly prepare the next generation of lawyers for the real world, in which it will be malpractice for them not to know the relevant international law or its status as the law of the United States? Doing nothing is like the Inquisition refusing to look through Galileo's telescope: Refusing to consider the international aspects of a given field of law — or to learn the characteristic forms of international law arguments — will not make them go away.

Admittedly, reforming a curriculum is like moving a graveyard, as President Woodrow Wilson observed after serving as the president of Princeton, and it will take law school faculties some time to recognize that everything has changed about the world except our way of thinking about it. But the place of international law within our constitutional order is neither simple nor irrelevant, and that fact offers reason enough to require law students to become fluent in its basic language.